



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/059  
Order No.: 91 (NY/2018)  
Date: 27 April 2018  
Original: English

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**Before:** Judge Alessandra Greceanu  
**Registry:** New York  
**Registrar:** Pallavi Sekhri, Officer-in-Charge

SHINDO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER ON WITHDRAWAL**

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**Counsel for Applicant:**  
Ibrahima Faye, UNJSPF

**Counsel for Respondent:**  
Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 23 June 2017, the Applicant, a staff member serving as Deputy Director for Investments at the D-1 level, step 8, in the United Nations Joint Staff Pension Fund (“UNJSPF”) in New York, filed an application contesting, “[t]he decision by the Director of the Investment Management Division to impose a disguised disciplinary measure on [him] by issuing a note as part of [his] official record, constituting a written reprimand in violation of [his] right, [...] and refusing to withdraw the note and in addition to include this information in [his] performance records through the misuse of the performance management system”.

2. The Applicant requests that the Tribunal orders “that the Note be withdrawn and award compensation for the mora[l] and psychological damage create[d] by the unlawful action in the amount of six months net base salary and compensation for costs associated with the case in the amount of \$10,000”.

3. On 23 June 2017, in accordance with art. 8.4 of the Tribunal’s Rules of Procedure, the Registry transmitted the application to the Respondent, instructing him to file his reply by 24 July 2017.

4. On the same day, the case was assigned to the undersigned Judge.

5. On 24 July 2017, the Respondent filed his reply arguing, *inter alia*, that the application is moot. The Respondent submits that, on 15 March 2017, the Director advised the Applicant that he rescinded his decision, and that the email was never included in the Applicant’s official record. According to the Respondent, the Applicant has, therefore, been granted the relief he requests, i.e. the withdrawal of the email from his official record and, as there is no longer a contestable administrative decision before the Tribunal, the application should be dismissed.

6. By Order No. 158 (NY/2017) issued on 8 August 2017, the Tribunal instructed the Applicant to file a response to the receivability issue raised by the Respondent in his reply by 30 August 2017.

7. The Applicant filed his submission in response to Order No. 158 (NY/2017) on 28 August 2017.

8. By Order No. 16 (NY/2018) issued on 23 January 2018 the Tribunal instructed the parties as follows (emphasis omitted):

... By 5:00 p.m. on Friday, 2 February 2018, the parties shall file a joint submission informing the Tribunal whether they agree to enter into informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions and whether they seek the suspension of the proceedings;

... In the event the parties do not agree to pursue informal resolution, by 5:00 p.m. on Friday, 2 February 2018 the parties are to file separate statements informing the Tribunal if additional written and/or oral evidence is requested to be produced and, if so, stating its relevance;

... If the parties agree that no further evidence is requested and that the Tribunal may decide the case on the papers before it, the parties are instructed to file their closing submissions, based only on the evidence already before the Tribunal, by 5:00 p.m. on Friday, 9 February 2018.

9. On 25 January 2018, the Applicant filed by email a request for extension of time informing that his Counsel, Mr. Ibrahima Faye, is on annual leave until 12 February 2018.

10. On 26 January 2018, the Tribunal instructed the Respondent by email to file a response, if any, by 5:00 p.m. on the same day to the Applicant's motion for an extension of time.

11. By Order No. 21 (NY/2018) issued on 29 January 2018, the Tribunal instructed the parties as follows (emphasis omitted):

... The Applicant's request for an extension [of] time is granted. By 5:00 p.m. on Friday, 23 February 2018, the parties shall file a joint submission informing the Tribunal whether they agree to enter into informal resolution of the case either through the Office of the Ombudsman or through *inter partes* discussions and whether they seek the suspension of the proceedings;

... In the event the parties do not agree to pursue informal resolution, by 5:00 p.m. on Friday, 23 February 2018 the parties are to file separate statements informing the Tribunal if additional written and/or oral evidence is requested to be produced and, if so, stating its relevance;

... If the parties agree that no further evidence is requested and that the Tribunal may decide the case on the papers before it, the parties are instructed to file their closing submissions, based only on the evidence already before the Tribunal, by 5:00 p.m. on Friday, 2 March 2018.

12. On 13 February 2018, the parties filed a joint submission informing the Tribunal that the parties have agreed to explore informal resolution of the case through *inter partes* discussions. The parties requested a suspension of the formal proceedings for 30 calendar days for the informal dispute resolution discussions.

13. By Order No. 39 (NY/2018) issued on 16 February 2018, the Tribunal instructed the parties as follows:

... The parties' joint request for suspension of the proceedings is granted and the proceedings before the Tribunal are suspended until 19 March 2018;

... By 5:00 p.m. on Monday, 19 March 2018, the parties are to inform the Tribunal as to the progress of the informal discussions and/or whether this case has been resolved. In the latter event, the Applicant

shall confirm to the Tribunal, in writing, that his application is withdrawn fully, finally and entirely, including on the merits.

14. On 15 March 2018, the parties filed a joint submission informing the Tribunal that “[...] the parties continue to explore informal resolution of the case through *inter partes* discussions. The parties have reached an advanced stage in their discussions”. The parties requested a further suspension of the formal proceedings of two (2) weeks in order to conclude their discussions.

15. On 19 March 2018, the parties were informed via email that the request for extension is granted and an order will follow.

16. By Order No. 59 (NY/2018) issued on 20 March 2018, the Tribunal instructed the parties as follows:

... The parties’ joint request for suspension of the proceedings is granted and the proceedings before the Tribunal are suspended until 3 April 2018;

... By 5:00 p.m. on Tuesday, 3 April 2018, the parties are to inform the Tribunal as to the progress of the informal discussions and/or whether this case has been resolved. In the latter event, the Applicant shall confirm to the Tribunal, in writing, that his application is withdrawn fully, finally and entirely, including on the merits.

17. On 2 April 2018, the parties filed a joint submission informing the Tribunal that they continue to explore an informal resolution of the case through *inter partes* discussions, that they have reached an advanced stage in their discussions, and they requested a further suspension of the formal proceedings of one month, until 2 May 2018, which will allow the parties to conclude their discussions.

18. By Order No. 72 (NY/2018) dated 3 April 2018, the Tribunal suspended the proceedings until 2 May 2018 and requested the parties to inform the Tribunal, by the same date, as to the progress of the mediation discussions and/or whether this case has been resolved.

19. On 26 April 2018, Counsel for the Applicant filed a notice of withdrawal, stating that:

... Pursuant to the terms and conditions of a Confidential Settlement Agreement signed between the Applicant and the Respondent on 26 April 2018;

... The Applicant hereby inform[s] the [Dispute Tribunal] that he/her[e]by withdraw[s] his Application UNDT/NY/12017/059 dated 23 June 2017, this, in response to [the Dispute Tribunal's] [O]rder No. 72 (NY/2018) from Honourable Judge Alessandra Greceanu dated 3<sup>rd</sup> April 2018"[;]

... The full, entire and final [w]ithdrawal of the [a]pplication Number UNDT/NY/2017/059, including on the merits, is done in view of and in order to give full effect to the amicable agreement reached between the parties at the outset of a successful *inter partes* discussion.

### **Consideration**

20. The Tribunal commends the Applicant for withdrawing the present case based on the informal communications between the parties. This saves valuable resources and contributes to a harmonious working relationship between the parties.

21. The Tribunal considers that each person has the fundamental human right to free access to justice, which includes the right to file an application in front of an impartial Tribunal, and therefore also the right to withdraw that application.

22. An application represents the materialization of an applicant's right to appeal the contested decision. This is the first procedural act by which an applicant invests the Tribunal of dealing with the appeal. The whole procedural activity will take place within its limits and the application must be filed by the person who has the right to appeal the contested decision (*ratione personae*), within the applicable time limit (*ratione temporis*) and in front of the competent Tribunal (*ratione loci*).

23. Consequently, to be legally valid, a request for the withdrawal of an application has to be formulated by the applicant and/or by his/her Counsel and must consist of the

unconditional expression of the applicant's free will to close his case before a judgment is issued.

24. An application can be withdrawn orally and/or in writing, partially or entirely. The withdrawal request can refer either to the pending application (as a procedural act) or to the right to appeal itself.

25. If an identical application is filed by the same applicant against the same party after she or he waived her or his right to appeal the matter, the exception of *res judicata* can be raised by the other party or ex officio by the Tribunal itself. *Res judicata* requires three cumulative elements: (a) same parties; (b) same object; and (c) same legal cause, and has both negative and positive effects: it is blocking the formulation of a new identical application and guarantees that it is not possible to rule differently in the same matter.

26. *Res judicata* is a reflection of the principle of legal certainty and does not prejudice the fundamental right to a fair trial since the access to justice is not absolute and can be subjected to limitations resulting from the application of the other principles. The principle of rule of law and the principle of legal certainty, expressed also by *res judicata*, require, *inter alia*, that an irrevocable decision given by the Tribunal not to be further questioned (*non bis in idem*) (see *Shanks* 2010-UNAT-026; *Costa* 2010- UNAT-063; *Meron* 2012-UNAT-198). As stated by the United Nations Appeals Tribunal in *Meron*, "there must be an end to litigation" in order to ensure the stability of the judicial process.

27. The Applicant expressed in his motion his will to withdraw his application and thereby to end the pending litigation.

28. In conclusion, the object of the withdrawal request is the right to appeal itself and represents the Applicant's free will to end the litigation. Since the Applicant has withdrawn his application, the Tribunal no longer needs to make a determination on the merits and takes note of the withdrawal.

IT IS ORDERED THAT:

29. The Applicant has withdrawn the matter in finality. There being no matter for adjudication by the Dispute Tribunal, Case No. UNDT/NY/2017/059 is hereby closed without liberty to reinstate.

*(Signed)*

Judge Alessandra Greceanu

Dated this 27<sup>th</sup> day of April 2018